

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

SIERRA CLUB,

Plaintiff,

v.

**UNITED STATES DEPARTMENT
OF AGRICULTURE, AND
RURAL UTILITIES SERVICE,**

Defendants.

Case No. 3:08-cv-04248-SC

STIPULATION FOR THE FILING OF AMENDED COMPLAINT

Pursuant to Federal Rule of Civil Procedure 15(a), the parties hereby stipulate to the filing of the attached Amended Complaint, which adds a second claim under FOIA by the same plaintiff against the same federal defendants.

In light of this stipulation, Plaintiff hereby withdraws its October 29, 2008 Motion to File Amended Complaint, (Dkt. No. 15).

The parties further agree, subject to the Court's approval, that defendants' answer or other responsive pleading to the Amended Complaint shall be due no later than January 9, 2009.

Respectfully submitted,

/s/ Michael T. Pyle

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PURSUANT TO THIS STIPULATION, IT IS SO ORDERED:

Date: 12/2/08

The Honorable
United States Judge



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**UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA**

| | | |
|---------------------------------|---|--|
| SIERRA CLUB, |) | |
| |) | |
| Plaintiff, |) | AMENDED COMPLAINT FOR |
| v. |) | DECLARATORY AND INJUNCTIVE RELIEF |
| |) | |
| |) | Case No. 3:08-cv-04248-SC |
| UNITED STATES DEPARTMENT |) | |
| OF AGRICULTURE, AND |) | |
| RURAL UTILITIES SERVICE, |) | |
| |) | |
| Defendants. |) | |

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 (1966), as amended, challenging the failure of the Rural Utilities Service, an agency within the Department of Agriculture, to lawfully and adequately respond to: (1) the Sierra Club’s (“Sierra

AMENDED COMPLAINT FOR DECLARATORY
 AND INJUNCTIVE RELIEF - 1

SIERRA CLUB
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 San Francisco, CA 94105
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1 Club” or “Plaintiff”) FOIA request for records concerning the East Kentucky Power Cooperative,
2 Inc. (“EKPC”) and Rural Utilities Service’s financial relations with EKPC, and (2) the Sierra Club’s
3 FOIA request for records concerning Brazos Electric Cooperative, Inc. (“Brazos”) and Rural
4 Utilities Service’s financial relations with Brazos.
5

6 **JURISDICTION**

7 2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B).
8 Venue in this district is proper under 28 U.S.C. § 1391(e) because Plaintiff Sierra Club is
9 incorporated in California and maintains its headquarters and resides in this district.
10

11 **INTRADISTRICT ASSIGNMENT**

12 3. This case is properly assigned to the United States District Court, Northern District of
13 California, San Francisco Division, as the Plaintiff is incorporated in California and resides and
14 maintains its headquarters in San Francisco, California.
15

16 **PARTIES**

17 4. Plaintiff Sierra Club is a national nonprofit organization of approximately 1.3 million
18 members and supporters dedicated to exploring, enjoying, and protecting the wild places of the earth;
19 to practicing and promoting the responsible use of the earth’s ecosystems and resources; to educating
20 and enlisting humanity to protect and restore the quality of the natural and human environment; and
21 to using all lawful means to carry out these objectives.
22

23 5. The Lone Star Chapter of the Sierra Club has approximately 24,000 members in the
24 state of Texas. Many of the Sierra Club’s members live and work in communities in the Waco-Riesel
25

1 region of Texas where air quality is likely to be adversely impacted by air pollution from coal-fired
2 power plants, including the Sandy Creek Power Plant.

3
4 6. The Cumberland Chapter of the Sierra Club has approximately 6,000 members in the
5 state of Kentucky. Many of the Sierra Club's members live and work in communities in the
6 Cumberland Plateau region of Kentucky where air quality is likely to be adversely impacted by air
7 pollution from coal-fired power plants, including the J.K. Smith Power Plant.

8
9 7. Since the mid-1990s, the Sierra Club, including its Lone Star and Cumberland
10 Chapters, has been actively involved in, and has expended considerable resources toward, ensuring
11 that coal-fired power plants, including Sandy Creek and J.K. Smith, are built and maintained in
12 compliance with requisite laws. As part of this effort, the Sierra Club routinely makes use of records
13 obtained through FOIA requests to ensure that all power plants are built and are operating in
14 compliance with applicable laws and regulations. FOIA records are also used while engaging in
15 educational and First Amendment activities as environmentalists and Sierra Club members. The
16 Sierra Club and its members are therefore harmed by the Rural Utilities Service's failure to fully
17 respond to the Sierra Club's FOIA requests because these refusals undermine the Sierra Club's
18 ability, and its members' ability, to pursue educational and advocacy measures on behalf of the
19 Sierra Club's members.
20

21
22 8. Defendant United States Department of Agriculture ("USDA") is an agency of the
23 United States, and has custody or control of the records Plaintiff seeks.

24 9. Defendant Rural Utilities Service ("RUS") is an agency of the United States
25 Department of Agriculture, and has custody or control of the records Plaintiff seeks.
26

**STATUTORY FRAMEWORK AND FACTS GIVING
RISE TO CAUSE OF ACTION**

THE FREEDOM OF INFORMATION ACT

9. FOIA requires agencies of the federal government, upon request, to search for and release records to the public, unless one of nine specific statutory exemptions applies.

5 U.S.C. § 552(b). The exemptions must be narrowly construed. If an exemption applies, the agency is required to disclose “any reasonably segregable portion of the record” containing the exempt material. Id.

10. Upon receiving a FOIA request, an agency has twenty working days to respond. Id. § 552(a)(6)(A). Although the agency may grant itself an extension of ten additional days in “unusual circumstances,” FOIA does not permit an agency to delay a response indefinitely. Id. § 552(a)(6)(B).

11. Pursuant to 5 U.S.C. § 552(b)(4) (“exemption 4”), records may be exempted from disclosure if they contain “trade secrets and commercial or financial information obtained from a person and [are] privileged or confidential.” Thus, certain legitimately confidential records may be lawfully withheld from an agency’s FOIA response under exemption 4. Pursuant to 5 U.S.C. § 552(b)(5) (“exemption 5”), records may also be exempt from disclosure if they are “inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency.” Thus, documents generated prior to an agency’s decision that reflect a deliberative part of the agency’s decision-making process may potentially be lawfully withheld from an agency’s FOIA response under exemption 5.

12. Under section 552(a)(6), a requestor may appeal an agency's failure to disclose requested records. Id. § 552(a)(6). An agency must make a determination on any such appeal within twenty working days. Id. § 552(a)(6)(A)(ii).

FACTUAL BACKGROUND

A. Sierra Club's October 26, 2007 FOIA Request

13. On October 26, 2007, Sierra Club filed a FOIA request with RUS for a variety of records related to loans, loan guarantees, and grants to EKPC related to the proposed J.K. Smith coal-fired circulating fluidized bed expansion project discussed at 71 Fed. Reg. 59070 (Oct. 6, 2006). The request also sought any approval requests by EKPC and any executed or unexecuted agreements related to the project to which EKPC was a party.

14. RUS did not make a determination on the FOIA request within the twenty working-day time frame required by the FOIA. After more than seven months, RUS provided only a partial response to the request on June 4, 2008. In its response, RUS made clear that this was only "a partial response" and that RUS would subsequently "compil[e] and review[] the remaining documents responsive to [the] request . . . [to] complete our entire response."

15. Specifically, RUS's June 4, 2008 partial response failed to respond in any way to items 3, 5, 7, and 9 of the Sierra Club's FOIA request, which sought:

- Any transactional documents for all other loans to EKPC that RUS has made, insured, or guaranteed, which at any time from January 1, 2006 to the present had not been fully repaid and remained outstanding.

- Complete, executed copies of any agreements, dated from January 1, 2005 to the present, to which EKPC is a party that pertain to the proposed Smith coal-fired circulating fluidized bed (CFB) Expansion Project discussed at 71 Fed. Reg. 59070.
- All records that relate to any request by EKPC for RUS consent or approval of any transaction, arrangement, or other action related to the proposed Smith coal-fired circulating fluidized bed (CFB) Expansion Project discussed at 71 Fed. Reg. 59070 or the construction, modification, or operation of the existing EKPC Smith Station or EKPC Hugh L. Spurlock Station in Mason County, Kentucky (Spurlock). Spurlock, as used in this request includes the coal-fired CFB Unit or Units that are sometimes referred to as E.A. Gilbert.
- All records relating to any attempt by EKPC to obtain financing for any aspect of the proposed Smith coal-fired circulating fluidized (CFB) Expansion Project discussed at 71 Fed. Reg. 59070, including but not limited to request for RUS loans, RUS insurance of loans and RUS guarantees of loans, and requests for financing from CoBank, the National Rural Utilities Cooperative Finance Corp., and other financial institutions.

16. More than three months later, on September 11, 2008, the Sierra Club sent RUS a letter indicating that the twenty-day time frame required by the FOIA had expired and that no response to items 3, 5, 7, and 9 of the Sierra Club's request had been received. Additionally, the Sierra Club notified RUS that the June 4, 2008 response to item 6 was inadequate because RUS

1 misread the requested item. In this letter, the Sierra Club clarified item 6 and asked that RUS
2 respond to item 6 by providing records “of unexecuted copies or drafts of any agreements, dated
3 from January 1, 2005 to the present, to which EKPC is a party and that pertain to the proposed
4 Smith coal-fired circulating fluidized bed (CFB) Expansion Project discussed at 71 Fed. Reg. 59070.”
5

6 17. Based on the records provided by RUS in its partial response, it is clear that records
7 exist related to items 3, 5, 6, 7, and 9 of the Sierra Club’s October 26, 2007 FOIA request.
8 Specifically, there should be records including, but not limited to: (1) mortgage and security
9 agreements, among other financial records, related to RUS’s consent for EKPC to obtain an
10 unsecured revolving credit line through the National Rural Utilities Cooperative Finance
11 Corporation, the Bank of Tokyo-Mitsubishi, Ltd., and other financial institutions; and (2) documents
12 related to EKPC’s Debt Service Coverage Ratio for the past three years.
13

14 18. To date, RUS has failed to respond to items 3, 5, 6, 7, and 9 of the Sierra Club’s
15 October 26, 2007 FOIA request.
16

17 **B. Sierra Club’s November 20, 2007 FOIA Request**

18 19. On November 20, 2007, Sierra Club filed a FOIA request with RUS for a variety of
19 records related to loans, loan guarantees, and grants to Brazos, including loans, guarantees, and
20 grants related to Brazos’s member cooperatives and Brazos Sandy Creek Electric (“Brazos Sandy
21 Creek”), between fiscal year 2001 and fiscal year 2008. The request also sought any and all records
22 related to involvement of RUS or other arms of the USDA with the proposed coal plant known as
23 Sandy Creek.
24

1 20. RUS did not make a determination on the FOIA request within the twenty
2 working-day time frame required by the FOIA. On March 5, 2008, counsel for Sierra Club contacted
3 RUS to inquire about the status of RUS's action on the FOIA request. Ms. Adrienne Stinnet, FOIA
4 Specialist with RUS, informed counsel that she could not say when a response would be forthcoming
5 to the entire FOIA request, but that the Sierra Club might receive a faster response – probably within
6 a week – if the Sierra Club identified a narrower set of documents for expedited treatment.
7 Accordingly, on March 6, 2008, the Sierra Club wrote to Ms. Stinnett identifying several narrower
8 categories of documents to target for expedited treatment.
9

10 21. In the March 6, 2008 FOIA request, (hereinafter “targeted request”) the Sierra Club
11 requested the following documents:
12

- 13 • Any records prepared or received by RUS since May 1, 2007, related to any
14 requests by [Brazos] for approvals by the government of actions by Brazos
15 related to the Sandy Creek Power Generation facility in McLennan County,
16 TX including the requests for approval, any comments relevant thereto, and
17 any approvals actually granted.
18
- 19 • Any records prepared or received since May 1, 2007, that relate to or discuss
20 the granting of new loans or loan guarantees to Brazos [including for example]
21 records regarding the loan to Brazos of \$199,693,000 announced in a USDA
22 press release on October 26, 2007.
23
- 24 • Any records prepared or received since May 1, 2007 that relate to or discuss
25 the entity known as Brazos Sandy Creek Electric Cooperative.
26

1 22. On April 24, 2008, RUS provided its final response to the targeted request, releasing
2 some documents with heavy redactions and withholding others. More specifically, the response
3 provided seven documents, three of which contained significant redactions. RUS's cover letter
4 stated that the redacted material and 77 full pages were being withheld pursuant to FOIA
5 exemption 4, 5 U.S.C. §552(b)(4), based on RUS's determination that disclosure "is likely to cause
6 substantial harm to the competitive position of the person from whom the information was
7 obtained." RUS's Kresponse further stated that an additional twenty-one pages of responsive
8 documents were withheld pursuant to FOIA exemption 5, 5 U.S.C. §552(b)(5), which protects
9 documents that are both deliberative and pre-decisional.
10

11 23. The records that RUS withheld under exemption 4 do not qualify for such an
12 exemption. For example, in a Power Purchase Agreement included in the documents RUS released,
13 RUS withheld under exemption 4 such information as the definitions of "Carrying Costs," "Coal
14 Index," "Commercial Operation Date," "Cost of Coal," and "Operating Standards." Such redacted
15 information is not subject to exemption 4 – among other things, it is contained in documents that
16 Brazos was required to submit to RUS, it is neither confidential nor privileged, and disclosure of
17 the information will not and cannot impair the government's ability to obtain such information in
18 the future.
19

20 24. RUS also unlawfully withheld records under exemption 4 that are publicly available
21 elsewhere. For example, RUS heavily redacted a chart that is available on RUS's web site. Among
22 other things, such information is plainly neither confidential nor privileged, and disclosure of the
23

1 information will not and cannot impair the government's ability to obtain such information in the
2 future.

3 25. RUS's withholdings on exemption 5 grounds are similarly unsupported and do not
4 qualify as pre-decisional, deliberative communications. For example, RUS withheld a) information
5 other than deliberative communications among RUS staff members or between RUS and other
6 agencies; b) post-decisional and/or non-deliberative communications; and c) purely factual matters,
7 or factual portions of otherwise deliberative memoranda. RUS applied exemption 5 to
8 communications between RUS and Brazos, and between RUS and other third (non-U.S. government)
9 parties – none of which is subject to exemption 5. See Dep't of Interior v. Klamath Water Users
10 Protective Ass'n, 532 U.S. 1 (2001).

13 26. RUS also failed to conduct an adequate search for responsive documents in its
14 custody or control. For example, RUS released a letter stating that "Brazos Electric has been in
15 discussions with RUS regarding acquiring an ownership interest in the Sandy Creek coal-fired 900
16 MW generation facility located near Riesel, McLennan County, Texas ("Sandy Creek Plant")"
17 (emphasis added). Yet the only record provided of discussions prior to June 29, 2007 is of a single
18 meeting on June 14, 2007. RUS also failed, for example, to provide a draft power purchase
19 agreement referenced in the same letter, nor did RUS provide other records that relate to or discuss
20 that agreement.

23 27. Other records mentioned in the documents that RUS produced were not themselves
24 provided in RUS's FOIA response. These include, for example, documents such as a) "Short Term
25 PPA's"; b) "Economic Analysis of LS Power Transaction"; c) S&P Rating and Fitch Rating; d)

1 Exhibits II and III to a memo about Power Purchase Agreements; and e) an e-mail of June 22, 2007.
2 Similarly, while RUS provided a letter stating that RUS had approved a loan guarantee, no other
3 records related to this loan guarantee were provided. That letter states that advances will be made
4 on a loan only after certain agreements were reached, contracts executed, and supporting information
5 submitted to RUS by Brazos, yet no such documents were provided to the Sierra Club by RUS. The
6 letter further states that "AN8" loan documents would be forwarded to Brazos "in the near future"
7 for execution but no such documents were provided in the FOIA response. Nor were emails
8 provided in RUS's FOIA response.
9

10
11 28. On June 5, 2008, the Sierra Club appealed RUS's partial denial of the Sierra Club's
12 FOIA request. See 5 U.S.C. § 552(a)(6). RUS never responded to the Sierra Club's appeal.

13 **PLAINTIFF'S CLAIM FOR RELIEF**

14 29. By failing to search for and provide all responsive records to the Sierra Club's
15 October 26, 2007 and November 20, 2007 FOIA requests; unlawfully withholding certain records
16 under exemptions 4 and 5; failing to segregate such records as required to provide non-exempt
17 information; and failing to reply to Plaintiff's appeal, Defendants are in violation of FOIA.
18 Id. § 552(a)(3)(A), (6).
19

20 30. Plaintiff has a right to obtain the requested records.
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WHEREFORE, Plaintiff prays that the Court:

- (1) Declare that Defendants have violated FOIA by failing to fully and adequately provide records in response to Plaintiff's requests, by failing to conduct an adequate search for the documents, and by unlawfully withholding documents under exemptions 4 and 5;
- (2) Order Defendants to make the requested records available to Plaintiff within twenty days;
- (3) Award Plaintiff its costs and reasonable attorneys' fees in this action; and
- (4) Grant such other and further relief as the Court may deem just and proper.

Respectfully Submitted,

/s/ William S. Eubanks II

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October 29, 2008

AMENDED COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF - 12

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